

Tuesday, 30 July, 1946

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

An application on behalf of the
Prosecution for leave to file the attached
application under Rule 6(b)(1) relative to
IPS Documents Nos. 1744 and 1906 (Paper
No. 307).

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth of
Australia.

Reported by:

Jack Greenberg
Chief Court Reporter,
IMTFE

Appearances:

For the Prosecution Section:

MR. DAVID N. SUTTON

For the Defense Section:

MR. WILLIAM LOGAN, Jr., Counsel for
the Accused KIDO, Koichi; and
MR. MICHAEL LEVIN, Counsel for the
the Accused SUZUKI, Teiichi.

For the Office of the General Secretary,
IMTFE.

MR. G. WALTER BOWMAN,
Clerk of the Court.

The proceedings were begun at 0900.

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THE PRESIDENT: Mr. Sutton.

MR. SUTTON: This is an application, sir, under Rule 6(b)(1) for permission to file an application to put the original of two documents in evidence and to be allowed to process them and introduce excerpts from them. They are IPS documents 1744 and 1906.

1744 is Hsu's document of the Nanking Safety Zone -- 167 pages. There are 69 separate documents or groups of reports in this from which we ask to offer in evidence 15. Due to the mechanical difficulty of having them all processed, we are offering only a portion.

As to the other document, 1906, that is the original file from the American Embassy at Nanking of correspondence - Volume IX of correspondence covering over 400 pages, much of which is entirely foreign to the purpose of this inquiry -- of this case.

THE PRESIDENT: You repeat that every time you come here. It occurs to me that probably it would be desirable that you should, say, at least one week before you apply to this Court, make that original available to the defense so that they might

be able to talk about it when we come before your Honor.

In addition to that, if the Court please, I have a recollection that, when this entire matter of the relaxation of Rule 6(b)(1) came up, it was more or less an expedient and was not to be indulged in to such an extent as the prosecution is now doing. I understood that it was just to be confined to a few documents, but the documents that they are referring to constantly in these motions -- one motion right after another, it is getting to be a tremendous proposition.

THE PRESIDENT: But, in fairness to the defense, I think you should have an opportunity to peruse the documents from which they propose to take exhibits so that you can come here and ask the Court to have additional matter --

MR. LOGAN: We appreciate that.

THE PRESIDENT: That ought to apply to all these applications, including those covering the affidavits and reports of atrocities.

MR. LOGAN: Yes. Those 650 affidavits -- we haven't seen one of those yet.

THE PRESIDENT: I suggest, if they will do so, I will defer consideration of that particular

peruse it and see what additional matter might be given to them. A week ought to be sufficient, or you could give them a longer time if they really need it. Some of the documents are large.

I don't propose to make any order today but to try that method which I now suggest, that these documents be deposited with the General Secretary for the purpose of enabling the defense to peruse them and enabling them further to ask for additional material to be supplied.

What do you say, Mr. Logan?

MR. LOGAN: That is exactly what I was going to bring up. About a month ago that's what your Honor suggested here, and we have not received document 1744 and 1906. We don't know what is in it at all. I don't know; I can't argue about it. In addition to that, I don't know which of the accused will be affected by the material contained in the documents, and I certainly can't waive the rights of any accused by just arguing a motion and not knowing what it is all about.

I think a week would probably be sufficient if they file it with the Secretariat and give us notice that it has been so filed, and it can be made available to ourselves to examine it. Then we will

matter dealing with affidavits and reports until you have had an opportunity of perusing these affidavits and reports and all other documents in respect to which application is made under 6(b)(1).

MR. LOGAN: I might say that we have further grounds in opposition to those 650 affidavits which we propose to raise at the proper time, in addition to --

THE PRESIDENT: I think I should have all the objections before the Judges.

MR. LOGAN: We will be prepared to go on with that at any time, your Honor. It might save time of the prosecution if we are successful with our arguments.

THE PRESIDENT: Could you put the arguments to me to be sent on, or would you want them put directly?

MR. LOGAN: I think we would prefer to put them to the entire Tribunal.

THE PRESIDENT: I will consult them on that today.

MR. LOGAN: One other thing I had in mind, if your Honor please: Those proceedings in Chambers -- some of the defense attorneys are apprehensive about the question as to whether or not they are part

of the record.

THE PRESIDENT: They are not. They are recorded, but they are not made part of the record. To the best of my knowledge, they are not. Only what takes place before all the Judges is part of the record. There is a complete record of everything, but they are not part of the record in the sense that that term is used in the Charter. They could be made part of it.

MR. LOGAN: We would like to have them made part of the record.

THE PRESIDENT: They could be part II of the record, comprising Proceedings in Chambers.

MR. LOGAN: Would your Honor consider entering an order to that effect after you take it up with the Tribunal?

THE PRESIDENT: I will have to take it up with the Judges before I make a decision like that.

MR. LOGAN: The reason we ask for that is that there have been some important decisions made in Chambers here, and important arguments, and we would like to have that considered as part of the record of the entire case.

MR. LEVIN: It could very easily be done, simply by an order of the Court directing that all

of the Proceedings in Chambers, which took place and were reported, be considered part of the entire record of the case.

THE PRESIDENT: I think the Charter itself attempts a definition.

MR. LEVIN: I happened to look at it with that idea in mind, but I'll look at it again and see whether that does define it. But, as I have seen the transcripts of the record, it occurred to me, as Mr. Logan states, that it was not part of the complete record; and there might be something there, in the event there is a review some time, that should be directed to the attention of the Commander-in-Chief, and it could not be done unless it was made a complete part of the record.

MR. LOGAN: As I understand it, the original intention of all of these Hearings in Chambers was to save time -- to which, of course, we all agree -- and expedite the trial.

THE PRESIDENT: Well, I will adjourn consideration of this application pending the production of the original to the General Secretary for perusal by the defense and direct that the defense should have at least one week --

MR. LEVIN: Before your Honor concludes,

may I suggest that, with reference to 1744, which is a volume of the Rape of Nanking, it seems to me that practically everything that is in 1744 has already been testified to, and there is no advantage in having those excerpts offered in evidence, that this evidence is merely cumulative.

THE PRESIDENT: It would in a sense. I don't know whether evidence becomes cumulative when you get two or three witnesses.

MR. LEVIN: I thoroughly agree with your Honor that after the Court hears a half-dozen witnesses on the same subject --

THE PRESIDENT: You are not challenging the accuracy of what the Professor said yesterday.

MR. LEVIN: It hasn't been challenged by cross-examination, in any event. So, under those circumstances, it almost becomes a verity.

THE PRESIDENT: Does that book cover the same events?

MR. LEVIN: It is entirely the report of practically the same events.

MR. SUTTON: I am perhaps a little more familiar with it than counsel for the defense.

MR. LEVIN: Just a minute, please. Would you mind?

It starts from December 14, 1937 and goes right through to February, 1938. I think it covers practically the same subject matter.

MR. SUTTON: If your Honor please, there are in here the original copies of the original letters to the Consular office that were sent by the International Committee for the Nanking Safety Zone. These letters have not been put in evidence; only Dr. Bates, in his testimony, referred to the fact that these reports were set out in Hsu's documents of the Nanking Safety Zone, and there are a number of cases detailed in here as to which no testimony has been put in the case at all.

MR. LEVIN: I think that that lends itself further to Mr. Logan's objection of yesterday to the effect that, not only is this hearsay, but it goes beyond the point of hearsay. We have no person who is sworn to the authenticity of those letters and this document. This is not an official document, as I understand it, of the government; it is simply a collection of letters and reports which were made by a private individual.

MR. LOGAN: Do I understand, Mr. Sutton, that these letters come from the Committee of which Mr. Bates was a member?

MR. SUTTON: From the International Committee to the Consular authorities in Nanking.

MR. LOGAN: Do you see what has happened here?

MR. SUTTON: They are, of course, introduced for the purpose of showing that notice was brought home to the Japanese Foreign Office in Nanking, almost day by day, of the actual happenings in the city of Nanking, setting them out in detail and setting them out by a number of the different cases that were brought to their attention.

MR. LOGAN: Do you see what has happened here, Judge? They put Mr. Bates on; he has testified and referred to some letters; and they propose to offer these letters at this time after Mr. Bates has left the stand. We have no opportunity to cross-examine him on these letters. I don't think that is exactly right and the proper way to conduct this case. Those letters apparently were written by Mr. Bates and his Committee.

MR. SUTTON: No, they are not. They are written by Mr. Raabe and Mr. Smythe.

MR. LOGAN: He was the Secretary of that Committee.

MR. SUTTON: No, he wasn't. Mr. Smythe was

the Secretary; Mr. Bates was a member of the Committee. Mr. McGee was a member of the Committee, and he will testify at the regular time in this case.

THE PRESIDENT: Where are Raabe and McGee?

MR. SUTTON: Raabe was last heard of in Germany. He was a German, last heard of in Berlin. We tried to trace him down. We've not been able to locate him.

THE PRESIDENT: What about McGee?

MR. SUTTON: McGee is here and will testify.

MR. LEVIN: Another point, if your Honor pleases: This book should have been presented to us for examination before Dr. Bates testified. So then, if we saw fit, we might have had an opportunity of cross-examining him on the book. Now he is gone, and now we have the book and have no opportunity of cross-examining at all. It is a most difficult kind of situation with reference to admitting testimony which cannot be challenged in any way; the verity cannot be challenged. It seems to me, on the part of the prosecution, they would want to offer this book to us so that the probative value of the testimony would be greater than it would be in this form.

MR. LOGAN: As a matter of fact, Judge, I assume that there may be something in here that

the Secretary; Mr. Bates was a member of the Committee. Mr. McGee was a member of the Committee, and he will testify at the regular time in this case.

THE PRESIDENT: Where are Raabe and McGee?

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MR. LOGAN: As a matter of fact, Judge, I assume that there may be something in here that

would tend to eliminate what I attempted to bring out in cross-examination yesterday. At the time Mr. Bates finished testifying, I assumed that that testimony would end there with respect to any notice that had been sent to Tokyo, and I was trying to show at that time that all his testimony was merely hearsay, that he never saw these documents. These documents might have something contained in them which will tear down what we have attempted to do on cross-examination. I don't know; I haven't examined it.

THE PRESIDENT: I think that the Members of the Court will require as many documents as they can get. It is very difficult for me to speak for the Members of the Court, but I think they will require as many documents as they can get about the Nanking Incident and others.

These documents written at the time are supposed to have a special value.

MR. LOGAN: That's true.

MR. LEVIN: We agree with that.

MR. LOGAN: But, where they have a living witness and somebody who is familiar with the document, let us have it ahead of time so we will have an opportunity to cross-examine that living witness while he is on the stand rather than put him on the

stand, let him go, then supply us with some documents. Let him testify and bear out the authenticity of these documents.

THE PRESIDENT: In the interest of justice we might think it desirable to have a witness recalled for further cross-examination after those documents, if they are tendered, are given in evidence.

MR. LEVIN: And after we have had an opportunity to examine them. Certainly, I don't understand the logic of offering a witness who has testified to facts contained in here and then subsequently offering the document itself.

THE PRESIDENT: Well, I understood the attitude of the American counsel yesterday to be that it didn't matter what happened at Nanking, the accused were not responsible; and they were not very much concerned about cross-examination. The Japanese counsel took a different view, apparently -- some of them.

MR. LEVIN: Well, that isn't altogether correct, your Honor. I think they were concerned about it, but I think they have some other ideas with reference to meeting the situation. Just what it is, however, I am not thoroughly familiar with

because it is a phase of the trial with which I am not so closely identified.

THE PRESIDENT: Then I will consider this application after the defense have had an opportunity to peruse the originals referred to in the application, and that will extend also to the earlier applications. I think that is the best way of doing this.

MR. SUTTON: Will your Honor indicate a time at which this will be --

THE PRESIDENT: A week from today.

MR. SUTTON: I will be glad to file these with the Secretariat. Is that correct?

THE PRESIDENT: I will continue the hearing a week from today, this day a week.

MR. SUTTON: Do I understand that I should now file these with the Secretary of the Court? Is that the proper place to file them?

THE PRESIDENT: Yes.

MR. SUTTON: We have no objection to that form of procedure, and I would have filed them before had it been indicated that was the proper mode of procedure.

THE PRESIDENT: I had suggested it before, as Mr. Logan said, but I am acting on it now.

MR. LEVIN: I thought that was understood to be the rule, that all those documents were to be filed with the Secretariat.

THE PRESIDENT: Not before the application.

MR. SUTTON: Do I understand then that the matter will be heard a week from today, or will it simply be the preliminary motion for permission to file the application?

THE PRESIDENT: You might agree on everything, and there will be no need to continue the hearing.

MR. SUTTON: One week from today.

CLERK OF THE COURT: August 6th, nine o'clock.

(Whereupon, at 0920, the proceedings were concluded.)

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